

**Correctional Health Care Solutions, Inc., formerly known as Lomax Medical Associates, Inc., Prison Division and District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, Petitioner. Case 4-RC-17357**

July 22, 1991

# DECISION, DIRECTION, AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered challenges in and objections to an election held November 2, 1990, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 31 for and 27 against the Petitioner, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions, briefs, and oppositions, and has adopted the Regional Director's findings and recommendations.<sup>1</sup>

<sup>1</sup> In the absence of exceptions we adopt, pro forma, the Regional Director's recommendations that the Employer's Objection 4 be overruled and that the issues raised by the Employer's Objection 5 and by the Petitioner's challenges to the ballots of Sonia Dunmore, Deborah Taylor, and Jacqueline LaRoda be resolved at a hearing.

The Employer objects, inter alia, to the Petitioner's use of terminated employee Wendy Davis as an election observer. In so contending, the Employer relies on Sec. 11310 of the Board's Casehandling Manual which provides that observers must be nonsupervisory employees of the employer unless a written agreement of the parties provides otherwise and that the use of an ineligible observer may result in an election being set aside. The Employer also notes that while the Manual allows an alleged 8(a)(3) discriminatee to serve as an observer, this is permissible only if a charge has been filed prior to the time of the election, which is not the case here. Finally, the Employer argues that the cases cited by the Regional Director for the proposition that the mere presence of a nonemployee as an observer does not invalidate an election are inapposite because they predate the Manual.

In adopting the Regional Director's finding that Wendy Davis was entitled to serve as an election observer for the Petitioner, we do not rely on the fact that Davis was the subject of an 8(a)(3) charge filed by the Petitioner after the election. We rely, rather, on the facts that the employment status of Davis was a matter of some dispute at the time of the election, e.g., her name was

## DIRECTION

IT IS DIRECTED that a hearing be conducted to resolve the issues raised by the remaining portions of the Employer's Objections 2 and 3, by its Objection 5, and by the challenges to the ballots of Sonia Dunmore, Deborah Taylor, and Jacqueline LaRoda.

IT IS FURTHER DIRECTED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., an original and seven copies of exceptions. Immediately on the filing of exceptions, the party filing them shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

## ORDER

It is ordered that the Employer's Objections 1 and 4, as well as those portions of its Objections 2 and 3 alleging that the election should be set aside because the Board agents mistakenly opened and counted the ballot of Wendy Davis, be overruled.<sup>2</sup>

IT IS FURTHER ORDERED that the matter is remanded to the Regional Director for Region 4 for further processing.

included on the *Excelsior* list supplied by the Employer while the Employer also claimed she had been terminated and the Union did not learn of the Employer's claim of termination until the day of the election. We also note that the provisions of the Board's Casehandling Manual are guidelines not rules. In these circumstances, in which there was a legitimate question regarding Davis' employment status that could not be resolved prior to the election, we find that Davis was entitled to act as an observer for the Petitioner during the election.

<sup>2</sup> However, the question concerning the *effect* of opening and counting that ballot is dependent on whether that ballot was critical to the outcome of the election. Hence, that portion of Objections 2 and 3 is subject to further hearing as noted below.